statement, but do not seem to be capable of being entirely harmonized by any theory of the subject." And again in conclusion: "It will seem from the above cases that the decisions are in a somewhat perplexing condition. The rank of the superior who gave the order, and the obviousness or degree of danger involved in violating the rule, are both elements which the courts have taken into account, in deciding some of the cases; but no general proposition seems to be certainly deducible from them which the courts would all accept." J. F. M.

EATON *v.* MOORE *et al.*

Nov. 17, 1910.

[69 S. E. 326.]

1. Pleading (§ 8*)—Conclusions.—An allegation that dynamite caps were improperly stored was improper, as stating a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12, 13; Dec. Dig. § 8*; Negligence, Cent. Dig. § 182]

2. Explosives (§ 8*)—Negligence—Pleading—Sufficiency.—Allegations that defendants improperly stored dynamite caps, that plaintiff, an infant, got possession of the caps, and in some way, and without his fault, the caps were exploded, doing great injury in and about his eyes, resulting in total blindness, are insufficient to show actionable negligence by defendants, or how the accident occurred.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

3. Pleading (§ 18*)—Declaration—Requisites.—A declaration must allege material facts sufficient to show a complete right of action in plaintiff, and the facts must be set forth with definiteness and certainty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

Error to Circuit Court, Rockingham County.

Action by one Eaton against J. S. Moore and another. Judgment for defendants, and plaintiff brings error. Affirmed.

WHITTLE, J. This writ of error is to a judgment for defendants on demurrer to the amended declaration. The declaration alleges in substance that the defendants, J. S. Moore and W. C. Switzer, were the owners of certain dynamite caps, easily exploded and very dangerous, which they had stored in an open outhouse located in the yard surrounding and close to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

tenant's house of the defendant Moore, which was occupied by the plaintiff and his father, who was tenant and employee of Moore; that the defendants knew of the dangerous character of the caps in question, and it was their duty to store them in a safe and suitable place, where they could not be reached, handled, taken possession of, or exploded by children of tender years living upon the premises of Moore, as was the plaintiff, and who did not know of their dangerous character and were incapable of protecting themselves. Nevertheless the defendants so wantonly, negligently, and carelessly stored the caps in the open outhouse that the "plaintiff, who was then an infant of the age of three years, * * * got possession of the same, and in some way, while in possession, and without any fault on the part of the plaintiff, the said caps were exploded, which did great injury in and about the eyes of said plaintiff, which injury * * * resulted in his becoming totally blind."

In the view we take of the case, it is not necessary for us to follow counsel in their discussion of the law touching turntables and attractive nuisances to children. That subject, however, was very fully considered in the recent case of Walker *v.* Potomac, etc., R. Co., 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, where Judge Buchanan in an able opinion declined to follow the line of decisions known as the "Turntable Cases," of which Sioux City R. Co. *v.* Stout, 17 Wall. 657, 21 L. Ed. 745, furnishes a conspicuous illustration. In the Walker Case the court laid down the general principle that "a landowner does not owe to a trespasser the duty of having his land in a safe condition for such trespasser to enter upon, and this rule applies as well to infants as to adults."

We may pause, also, to observe that in the cases of Richmond, etc., Ry. Co. *v.* Moore's Adm'r, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258, and Clark *v.* Fehlhaber, 106 Va. 803, 56 S. E. 817, 13 L. R. A. (N. S.) 442, cited by the plaintiff in error, the plaintiffs were not trespassers, but invitees upon the defendants' premises, to whom they owed a higher degree of duty.

In the instant case the declaration is inherently defective. Thus it alleges that the dynamite caps were improperly stored in the outhouse, which is a mere conclusion of the pleader, without stating the facts upon which it is founded. If the manner in which the caps were stored had been averred, it might have disclosed that the defendants were guilty of no actionable negligence with respect to them. Nor does the declaration contain any allegation as to how the caps came into the plaintiff's possession. The charge is that, by reason of the caps being improperly stored and exposed, the child got possession of them.

But whether this possession was acquired from the outhouse by the unaided effort of the child, or through some other agency, is altogether conjectural. The possession may have been just as easily obtained through a source for which the defendants were in no way responsible. An adult, for instance, may have possessed himself of the caps and delivered them to the child, or else laid them down in an exposed place, where they were found, and thus came into his possession, in either of which events there would have been an intervening efficient cause for which the defendants were not answerable in damages.

The averment as to how the injury to the child was brought about is, if possible, still more indefinite than the allegation as to the means whereby the caps came into his possession; the allegation being that "in some way, while in his possession, without any fault on the part of the plaintiff, the said caps were exploded." The declaration does not aver that the plaintiff exploded the caps, nor does it show that they were exploded by an agency for which the defendants were responsible. In other words, every averment of the declaration may be true, and yet there may be no liability whatever resting on the defendants.

It is an elementary rule of pleading that the declaration must allege material facts sufficient to show a complete right of action in the plaintiff. The facts must, moreover, be distinctly and not inferentially alleged, and must be set forth with definiteness and certainty. The courts cannot supply by intendment material averments which the pleader has failed to make.

In Chesapeake & Ohio Ry. Co. *v.* Hunter, 109 Va. 341, 64 S. E. 44, it was held that "it is not sufficient for a declaration to allege negligence in a general way (for to do so is only to state the pleader's conclusions of law from undisclosed facts), but it must aver the act of negligence relied on with reasonable certainty, and show that such act constitutes the efficient and proximate cause of the injury."

For these reasons, we are of opinion that there is no error in the judgment complained of, and it must be affirmed.

Affirmed.

Note.

This case again refuses to follow the "Turntable Cases," as stated in the opinion. See the annotation appended to the case of Walker *v.* Potomac, etc., R. Co., 105 Va. 226, 53 S. E. 113, 12 Va. Law Reg. 242. We will however refer to the case of Harriman *v.* Railway Co., 45 O. St. 11, in which a railroad company was held liable to a child of tender years injured by the explosion of a signal torpedo left upon a railroad at a point where the public, including such children, had been permitted to pass and repass for a long time, and which a child picked up and handled. But the supreme court of Ohio afterwards repudiated the doctrine of the Turntable Cases in Wheeling, etc., R. Co. *v.* Harvey, 77 O. St. 235, 83 N. E. 66, and followed the

ruling of the Virginia Court of Appeals in Walker *v.* Potomac, etc., R. Co., above cited. See, also, case notes in 14 L. R. A. N. S., p. 586, and 24 id. 1257. The exhaustive subject note appended to Cahill *v.* Stone and Co., 19 L. R. A. N. S., 1094, fully reviews the cases, with the arguments pro and con the "turntable doctrine" or that of "attractive nuisance" as it is also called. A forcible expression of the latter is found in Uthermohlen *v.* Boggs Run Co., 50 W. Va. 457, 40 S. E. 410, where it is said that it shifts the duty of watchfulness and care from the shoulders of parents, where the Creator had placed it, to the shoulders of the landowners using their property to make a living.

J. F. M.

DAVIDSON *v.* WATTS & FLINT.

Nov. 17, 1910.

[69 S. E. 328.]

1. Pleading (§ 104*)—Plea to Jurisdiction—Plea in Person—Necessity.—A plea to the court's jurisdiction must be pleaded in person, and not by attorney the appearance of an attorney being by leave of court, and hence an acknowledgment of jurisdiction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 214; Dec. Dig. § 104.*]

2. Witnesses (§ 345*)—Credibility—Punishment for Felony—Effect on Credibility.—While Code 1904, § 3898, providing that, except as otherwise provided, one convicted of felony shall not be a witness unless he has been pardoned or punished therefor, restores the competency as a witness of one punished for a felony, it does not prevent his conviction and punishment from being shown to affect his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1127; Dec. Dig. § 345.*]

3. Appeal and Error (§ 1056*)—Harmless Error—Exclusion of Evidence—Corroborative Evidence.—The rule that error in excluding corroborative evidence is not reversible only applies where the record shows that it could not affect the verdict, so that error in excluding evidence of a witness' conviction of, and service of sentence for, grand larceny, to affect his credibility, in an action for the destruction of wheat stacks by a fire from a threshing machine engine, cannot be said to have been harmless, where such witness' testimony went to the question of whether the spark arrester of the engine was in place, which was a material question, and the other evidence as to such matter was contradictory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.